could settle the status and rights of the parties with respect to the policy. Not only is this decision correct under the principles above set forth,[11] but if the *situs* of a chose in action be deemed to be with the creditor it is difficult to see how any adjudication could ever be obtained upon a state of facts such as are presented in that case where the parties claiming are residents of different states.[12] The same inconvenience would also arise if there were but one person claiming adversely to the plaintiff and that person resided in a state where the insurance company had no duly accredited agent. The decision in the principal case, therefore, is a commendable one both logically and on the ground of expediency.

NATURE AND EXTENT OF THE RIGHT IN TRADE-MARKS.—"A trade-mark is an arbitrary, distinctive name symbol or device to indicate or authenticate the origin of the product to which it is attached."[1] For the acquisition of a right in such a mark, there must be, in addition to invention, such use in connection with a particular product as will identify the origin of that product among others of the same class.[2] Once the right is acquired, however, mere use of the distinctive symbol by another amounts to a misrepresentation that his goods are those of the owner of the trade-mark. This misrepresentation constitutes the ultimate offense in cases of trade-mark infringement[3] and is an actionable wrong regardless of intent.[4] This fact, that even innocent use will constitute an infringement, has resulted in the classification of the right in a technical trade-mark as a property right,

---

[11]But see Jellenik *v.* Huron Copper Mining Co. (1897) 82 Fed. 778; Gleason *v.* Northwestern etc. Ins. Co. (1911) 203 N. Y. 507, 97 N. E. 35.

[12]See Morgan *v.* Mutual etc. Ins. Co., *supra*, p. 653.

[1]G. W. Cole Co. *v.* American Cement & Oil Co. (C. C. A. 7th 1904) 130 Fed. 703, 705; see Ball *v.* Broadway Bazaar (1909) 194 N. Y. 429, 434, 87 N. E. 674. This definition serves to distinguish a technical trade-mark from a trade name which does not of itself point to the origin of the goods but may do so by an acquired secondary meaning which will be protected on the doctrine of unfair competition. G. W. Cole Co. *v.* American Cement & Oil Co., *supra*; Waltham Watch Co. *v.* American Waltham Watch Co. (1899) 173 Mass. 85, 53 N. E. 141; Draper *v.* Skerrett (C. C. 1902) 116 Fed. 206.

[2]Tetlow *v.* Tappan (C. C. 1898) 85 Fed. 774; Derringer *v.* Plate (1865) 29 Cal. 293, 295; see G. & C. Merriam Co. *v.* Saalfield (C. C. A. 6th 1912) 198 Fed. 369, 372.

[3]McLean *v.* Fleming (1877) 96 U. S. 245, 255; Church & Dwight Co. *v.* Russ (C. C. 1900) 99 Fed. 276; see Canal Co. *v.* Clark (1871) 80 U. S. 311, 322. The injury to the right in a trade name is in its essence the same. Bissel Chilled Plow Works *v.* T. M. Bissel Plow Co. (C. C. 1902) 121 Fed. 357. In fact, both classes of cases are simply branches of the law of unfair competition, see G. & C. Merriam Co. *v.* Saalfield, *supra*, and the underlying principle is to afford protection to the good will of a business. See McLean *v.* Fleming, *supra*.

[4]Church & Dwight Co. *v.* Russ, *supra*; Coffeen *v.* Brunton (1849) 4 McLean 516; see Lawrence Mfg. Co. *v.* Tennessee Mfg. Co. (1891) 138 U. S. 537, 549, 11 Sup. Ct. 396. In the last case, it is indicated that rebuttal of the presumption of fraudulent intent would result in exemption from liability for damages, leaving the plaintiff to an injunction only. *Cf.* McLean *v.* Fleming, *supra*, p. 257.

which will be afforded unlimited protection as such.[5] The result of the protection given by the courts undoubtedly is to create rights which are for many purposes the same as those in property.[6] Yet a trade-mark is not, strictly speaking, property, except as it is an accessory to an established business.[7] The better supported view is that, however the right be classified,[8] the ground on which jurisdiction is assumed is not the protection of the right itself, but rather protection against injury to a business by false representation of wares by the misappropriation of a trade-mark.[9] In support of this latter view, the Supreme Court has lately held in *Allen & Wheeler Co.* v. *Hanover Star Milling Co.* (U. S. Sup. Ct., Oct. Term 1915, No. 30, March 6, 1916), that protection will not be afforded a trade-mark beyond the territory in which it has become known to the public by the extension of the owner's trade.[10]

It is possible that, even assuming an absolute right of property in the junior appropriator, the result of the principal case may be reached on the ground that use of another's trade-mark in a locality where the goods of the first user of the trade-mark are unknown, does not amount to a misrepresentation; does not in short, constitute an injury. Or again, granting a technical injury by such use, the plaintiff very possibly may be unable to show actual damage, and equity may well leave him to his action at law for nominal damages until, having extended his trade, he can show such irreparable injury as would be a ground for injunctive relief. In brief, the determination of the extent of the right in question appears to turn rather on the nature of the violation of the right than on the nature of the right itself. If the law of trade-marks and that of trade names[11] are both merely branches of the broader law of unfair competition,[12] and the essence of the injury is the same in both cases, then the rule of territorial limitation applied in the one class of cases is rightly applied to the other as in the principal case. To hold otherwise is to protect the good will of a business beyond the limits to which the industry of the owner has extended it.

---

[5]Derringer *v.* Plate, *supra*; see Hopkins, Unfair Trade, 8, 10; Trade-Mark Cases (1879) 100 U. S. 82, 92. In cases of trade names, on the other hand, protection will not be granted beyond the locality in which the name has acquired a secondary meaning. Cohen *v.* Nagle (1904) 190 Mass. 4, 76 N. E. 276.

[6]A trade-mark may be sold as part of an established business, Leather Cloth Co. *v.* American Leather Cloth Co. (1865) 11 H. L. Cas. 522, and a right to use it will pass to one receiving exclusive sales rights in a particular territory from the owner of the business. Fred Gretsch Mfg. Co. *v.* Schoening. (D. C. S. D. N. Y. 1916) 54 N. Y. L. J. 2405.

[7]It is analogous to the good will of a business, in that it cannot be assigned apart from the business. Bulte *v.* Igleheart Bros. (C. C. A. 7th 1905) 137 Fed. 492, 498.

[8]For a statement that there is no property right whatever in a trade-mark, see for example Collins Co. *v.* Brown (1857) 3 Kay & J. 423, 426.

[9]Perry *v.* Truefitt (1842) 6 Beav. 66; Ainsworth *v.* Walmsley (1866) L. R. 1 Eq. Cas. 518, 524; Chadwick *v.* Covell (1890) 151 Mass. 190; see Lee *v.* Haley (1869) 39 L. J. [N. S.] 284, 286.

[10]Theodore Rectanus Co. *v.* United Drug Co. (C. C. A. 6th 1915) 226 Fed. 545, *accord,* resting its decision on the ground of estoppel. It is difficult to see how the grounds of an estoppel can be found in such a case where neither party knew of the use by the other.

[11]See note 1, *supra.*

[12]See note 3, *supra.*